

Orissa High Court
Orissa High Court
Tata Steel Ltd. vs State Of Odisha And Others on 9 October, 2012
ORISSA HIGH COURT, CUTTACK

WRIT PETITION (C) Nos. 15519/2010, 5737/2010, 7975/2011, 18577/2011, 5186/2012, 5187/2012, 1087/2008, 2959/2008, 3562/2008, 3563/2008, 3775/2009, 3903/2009, 3132/2010, 1963/2012, 5764/2007, 6982/2012, 7/2008, 3010/2012, 13978/2008, 3515/2008, 579/2010 and 5101/2012.

In the matter of applications under Articles 226 and 227 of the Constitution of India -----

TATA STEEL LTD (WP(C) 15519/2010) ESSAR STEEL ORISSA (WP(C) 5737/2010) M/s. ACC LTD. (WP(C) 7975/2011) M/s. JAYSHREE CHEMICALS LTD. (WP(C) 18577/2011) M/s. GMR KAMALANGA (WP(C) 5186 & 5187/2012) INDIAN METALS AND FERRO LTD (WP(C) 1087/2008) HINDALCO INDUSTRIES (WP(C) 2959/2008) RUNGTA MINES LTD (WP(C) 3562/2008) MANGILLALL RUNGTA (WP(C) 3563/2008) NAGAR EXPORT PVT, LTD (WP(C) 3775 & 3903/2009) MIKAGE STONE DEVELOP (WP(C) 3132/2010) M/S. BHARATI TELEMEDI (WP(C) 1963/2012) MAHASWARI COAL (WP(C) 5764/2007) M/S. ACC LTD. (WP(C) 6982/2012) IFGL REFRACTORIES (WP(C) 7/2008) M/S ADANI ENERPRISE (WP(C) 3010/2012) EMAMI PAPER MILLS (WP(C) 13978/2008) M/S VEDEANT ALUMINIUM (WP(C) 3515/2008) DISHNET WIRELESS LTD (WP(C) 579/2010) M/S VYOM TRADE LINK (WP(C) 5101/2012) Petitioners Versus

State of Odisha and others Opposite parties 2

For Petitioners - Mr. S. Ganesh (Senior Advocate)

M/s Jagabandhu Sahoo,

N.K. Rout, and P. Mohapatra

(WP(C) 15519 & 3132 of 2010)

(WP(C) 1087,2959,3562 &3563 of 2008)

(WP(C) 3775, 3903 of 2009)

(WP(C) 1963 of 2012)

M/s Satyajit Mohanty, R.R.

Swain, S. Pattanaik and N.K. Dash

(WPC 5186, 5187 & 6982 of 2012)

M/s Bibeka Mohanty, S.K.

Mishra, S.K. Jena, N.R. Mohanty,

C.R. Dash, M.Roul & M.

Wright

(WP(C) 18577/2011, 3515/2008

&, 579/2010

M/s Pranaya K. Harichandan

CH.M.R. Mishra, B. Behera

(WPC 3010 & 5101 of 2012)

M/s Subash Chandra Lal, Sumit

Lal & Sujit Lal

(WP(C) 7 & 13978 of 2008,

& 5764 of 2007

M/s Sidhartha Ray and S. Dey

(WP(C) 7975 of 2011)

M/s S. Kanunga, CH.S. Mishra,

R.N. Pattnaik, N.R.

Mohanty,

M/s Bibek Mohanty, S.K. Mishra,

B.K. Sahool & M.Wright

(WP(C) 5737 of 2010)

For Opposite parties - Mr. A. Mohanty (Advocate General) and Mr. R.P. Kar

THE HONOURABLE CHIEF JUSTICE MR. V.GOPALA GOWDA

AND

THE HONOURABLE MR. JUSTICE S.K.MISHRA

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----- Date of Hearing:
2 7 . 0 7 . 2 0 1 2 D a t e o f j u d g m e n t - 0 9 . 1 0 . 2 0 1 2
----- S.K.Mishra, J.

The following questions arise for determination in this bunch of writ petitions:-

- (i) Whether the entry tax under Orissa Entry Tax Act, 1999, can be levied and/or imposed on the value of the goods imported by the petitioners from outside the country ?,
- (ii) Whether such entry tax under the aforesaid Act can be levied and/or imposed on import of plant and machinery for establishing a plant in the State of Odisha ?
- (iii) Whether the entry tax can be levied on certain raw materials and goods imported from outside the country and purchased from outside the State when such materials have not been listed in the schedule appended to the Orissa Entry Tax Act ? and
- (iv) Whether the Orissa Entry Tax Act, 1999, hereinafter referred to as 'the Act' for brevity, is violative of Entry 83 of List I of Seventh Schedule and Article 246 of the Constitution of India.

2. The petitioners, in all these writ petitions except a few, whose cases shall be described separately below, are operating different industries for which they are importing coal from outside the country for being used as raw materials for production of various products. The petitioners, in order to carry out their manufacturing activity both inside the State and the factories located outside the State, import raw materials from outside India, for which they obtained necessary license from the appropriate authority. They have been registered under the OVAT Act, CST Act and the Orissa Entry Tax Act, 1999 and have been allotted TIN number by the Sales Tax Officer. They bring various goods including scheduled goods for their plants from within the State and also from outside the territory of India by way of import. The materials so purchased from various countries are duly 4

supported by bills and other documents, which have been incorporated in the accounts of the petitioner-Companies.

3. The petitioners claim that Section 3 of the Act is the charging Section which only conveys a definite charge of tax on happening of taxable event and not bereft of the said provisions. Section-2 (j) defines 'purchase value', which can be termed as measure of tax provided for procedure for ascertaining purchase value for quantification of tax. A conjoint reading of both the provisions indicate that the goods imported from outside the country are not contemplated for taxation under Section 3 of the Act. Section 3 of the Act may not be controlled by the above provision. It is contended that various clauses of Section 2 are inalienable limbs of Section 3, which are not measure of tax but define expression to make impost with element of certainty and definiteness. The petitioners claim that under Article 286 of the Constitution of India there has been a restriction for imposition of tax on the sale or purchase of goods, where such sale or purchase takes place in course of import of goods, into or export of the goods out of the territory of India [Article 286(i)(b)]. It is contended that Entry 52 of List-II of the Seventh Schedule, which provides for tax on entry of goods into the local area for consumption, use or sale, does not include any import made from outside the country and accordingly, the assessment of the taxing authority on the imports so made is contended to be illegal.

4. In course of hearing, the learned Senior Advocate Mr. S. Ganesh, appearing for one of the petitioners placed reliance on the reported cases of Tata Iron & Steel Company Ltd. Vs. State of Jharkhand and others, (2007) 6 VST 587 (Jharkh), FR. William Fernandez Vs. State of Kerala and others, (1999) 115 STC 591(Ker), Thressiamma L. Chirayil Vs. State of Kerala, (2007) 7 VST 293 5

(Ker) as well as the judgment rendered by the Full Bench of the Orissa Sales Tax Tribunal in the case of Hindustan Aeronautics Ltd. Koraput Vs. State of Orissa and contended that in all the above cases the various High Courts as well as the Sales Tax Tribunal of the State of Odisha has come to the conclusion that entry tax cannot be levied upon imports made from outside the country. Therefore, the petitioners pray that the entry tax levied on the imports should be exempted and the State should be directed to refund the tax collected from them on account of entry tax.

5. Some of the cases have different set of facts, and therefore, they are discussed separately with proper heading as follows:- In W.P.(c) No.13978 of 2008 (M/s Emami Paper Mills Ltd. vs. State of Orissa and others), the petitioner claims that it is an incorporated company and has a paper manufacturing plant at Balgopalpur in the district of Balasore. They are producing newsprint, various writing and printing paper by using 100% recycled waste papers. The company has stopped rice straw from April, 2006 and, therefore, now using 100% waste paper as raw materials for manufacturing paper. They decided to expand their plant. Thus, for additional capacity they have placed orders for a major plant and machinery. In pursuance of such expansion program, they entered into agreement and placed order for a paper plant and other machinery on a company namely "Global Equipment and Machinery Sales Inc., Montgomeryville, Pennsylvania, USA". Pursuant to such agreement and orders, the petitioner has imported into India a paper manufacturing plant in knock down condition with spares from USA (after dis-assembling the same as the entire plant cannot be rooted out from USA and established in India). Besides that the petitioner also imports other machinery from the other countries and the said 6

imported machinery and spares parts entered into the country through different ports and are released by the petitioner on payment of the import duty. The petitioner claims that the plant and machinery are brought in a knock down condition in ships and are unloaded in Calcutta Port and or other ports and are released after payment of import duty levied under the Customs Act. After the said plant and machinery were unloaded from the ships and cleared of the customs duty, the said plant and machinery were transported to the factory premises at Balgopalpur causing entry into the local area of Balasore under way bills prescribed under Orissa Sales Tax Rules and Orissa VAT Rules. The petitioner claims that even though the company is not liable to pay entry tax in respect of paper making plants and machinery imported from USA and other countries, by letter dated 25.03.2006 the opposite party no.3 called upon the petitioner to submit a statement showing the name of goods imported by the petitioner from the USA. This fact is subject matter of W.P.No.12622 of 2006 and the same is pending consideration before this Court. The petitioner protested that it is not liable to pay entry tax on the plant and machinery brought from USA in course of import and, further, since the plant is not a schedule good, the same cannot be subjected to entry tax under Orissa Entry Tax Act, 1999. The opposite parties denied to give way bills and 'C' forms and perpetrated other type of harassment if the petitioner will not pay entry tax on the plant and machinery so imported from USA. The petitioner had no other alternative than to make ad hoc payment through challans towards Orissa Entry Tax under protest. The demand of entry tax on imported plant and machinery was not authorized by the Act and such demand was arbitrary and the petitioner is before this Court in W.P.(C) No.12622 of 2006, which was admitted by order dated 7

08.10.2006 and further direction was given that the petitioner should not be asked to pay any amount on entry tax in view of the payment of the customs duty by the petitioner.

Petitioner claims that the paper plant is a mega plant and it had to purchase different types of machinery, its spare parts from different manufacturers in other States of the Country. These machinery and spare parts are of definite specifications and are neither manufactured in Orissa nor available otherwise. Therefore of necessity, the petitioner has to purchase the same from different parts of the Country (other than Odisha) and

these are not manufactured in Odisha. The petitioner claims that the spare parts have a definite commercial identity of its own and bear a different name and as such are not scheduled goods under the Schedule of Act. The petitioner further submits that even though it is not liable to pay entry tax on the goods purchased from different States in as much as those are neither scheduled goods nor can those goods be subjected to levy of entry tax, the opposite party no.3 has assessed the petitioner to tax in respect of these goods both imported from outside the Country and purchased from outside the States (CST Goods) and imported into the local area of Balasore. The opposite party no.3 has completed assessment of the years, 2005-06 and 2006-2007 under the Act and in the said order of assessment the opposite party no.3 has assessed the petitioner to pay entry tax on these goods (CST Goods). However, no demand has been raised in respect of goods imported from outside the country in view of the interim order of stay passed by this Court. The petitioner, therefore, prays in this writ petition to give necessary directions not to collect entry tax on goods, machinery and plants imported from USA and also not to assess entry tax on spare 8

parts and machinery, both imported from outside the country and purchased from outside the State as they are not included in the Schedule of the Act.

6. In W.P.(c) No.7 of 2008 (M/s IFGL Refractories Vs. State of Orissa and others), the Company is established as an import expand project. Commercial production was started in March, 1993. Since then, the petitioner has been continuously expanding capacity thereof by installing and erecting plants and machinery both indigenous and imported. The petitioner's policy is to identify the customers' need, design and develop products and successfully manufacture and supply at competitive price to achieve customer satisfaction. Nearly 60% of the products manufactured are presently exported outside the country. For manufacture of refractory products, the petitioner from time to time requires imported raw materials, stores and spares, trading items and capital goods which are released by the custom authorities after the petitioner effects payment of duty levied thereon as per the provision of the Customs Act. Generally said imported items are received either at Kolkata Port or at Kolkata Airport wherefrom they are transported to the petitioner manufacturing facilities under way bills in the Orissa Sales Tax Rules/VAT Rules by opposite party no.3 For carrying manufacturing activity and production of item referred above, i.e. Ladle Shrouds, Sub entry Nozzels, Monoblock Stopper, Tundish Nozzle, Slide Gate Plates etc, some of the raw materials and ancillary goods are not available nor are they manufactured in India. Consequently, the petitioner has to import the same from different countries of the world on payment of the custom duty. These materials are Fused Silica, Lime stabilize Fused Zirconia, Fused Magnesia, Sintered Magnesia, Silicon Metal, Natural PVC, Refractory Glaze, Furfular Alcohol and Micro Silica. The petitioner-company claims that it is not 9

liable to pay entry tax in respect of the said imported items. The opposite party no.3 has been collecting the same and the petitioner has been effecting payment thereof under protest. The petitioner claims that the company is not liable to pay entry tax as the same is not falling within the definition of scheduled goods as identified in the Act, but the opposite party no.3 has threatened to stop issuing way bills and 'C' forms for which the company has been paying entry tax on purchase. Besides, the raw material imported from other countries, the petitioner also uses raw materials available in other States of the country, which are not manufactured in Odisha. These raw materials are Mag Alumina Spinel, Zircon sand/Flour, Bauxite (Rotary Kiln/Calcined), Tabular Alumina, Brown Fused Alumina, White Fused Alumina, Reactive Alumina, Dead Burn Magnesia, Silicon Carbide, Borax, Allu Metal, Carbon Black. The petitioner has no other alternative but to effect payment of entry tax on these items and the company should be exempted from the payment of entry tax and tax already paid should be refunded to it.

7. In W.P.(C) No.5764 of 2007 (M/s Maheswari Coal Services (P) Ltd. Vs. State of Orissa and others), the petitioner-company is a dealer in coal. It not only purchases coal from Mahanadi Coal Ltd, but also imports Steam (Non-coke) coal from different sellers under high seas agreements beyond the customs barrier of the country. Thus, it is submitted that the major quantity of Steam (Non-coke) coal is received by the petitioner at Paradip Port in the State of Orissa in course of import into the country. The petitioner claims that after customs clearance, it stores the said coal on the plot of land rented to it by Paradip Port Trust and the coal is

sold to buyers by delivering the same at Paradip. The Steam (Non-Coke) coal so received in the ships in course of import, do not enter into the local area of Paradip 10

from any other local area in the State or from any other States of the country. The petitioner was reluctant to pay entry tax demanded by opposite party no.3 on the imported coal at Paradip Port but opposite party no.3 stopped supplying way bills to the petitioner and threatened to take further harassing attitude. The petitioner has to pay a token sum of Rs.5,000/- on 27.01.2005 so that supply of way bills by the opposite party no.3 would remain unhindered. In the same manner, the petitioner has also paid huge sum amounting to almost Rs.20,00,000/- towards entry tax. The petitioner claims that it is not liable to pay such entry tax and necessary directions be passed for refunding the tax already collected from it.

8. In all the cases, a common defence has been taken by the State of Odisha. It is submitted by the State that the Orissa Entry Tax Act, 1999 is a destination based tax, which is enacted within the field of legislation envisaged in Entry 52 of List II of Seventh Schedule to the Constitution and tax is exigible on entry of goods into the local areas for consumption, use or sale therein. The place of origin of goods has no impact on the levy.

Against the contention of the petitioners that entry tax is not leviable on goods imported from outside the country, inasmuch as, it is hit by Article 286 of the Constitution, on behalf of the State Government learned Advocate General submits that the challenge is untenable on the face of the said Article, which contemplates rider "tax on sale or purchase of goods" which "takes place in course of import into the territory of India" but, not in respect of "taxes on entry of goods into a local area" as per Entry 52 of List II of the Seventh Schedule. The State submits that incidence of import ends once the goods cross the customs barrier. After crossing of customs barrier, the goods enter into the local area for consumption, use or sale.

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On behalf of the State Government learned Advocate General further submits that the observation made with reference to terminal tax is not applicable to entry tax. So, it is erroneous to submit that as because imported goods do not mingle with mass of domestic goods, the levy of entry tax on imported goods would be out of purview of domain of the State.

The learned Advocate General submits that Section 2(j) of the Act, which defines purchase value, does not expressly provide for including the import duty. However, it provides for all other charges incidental to the purchase of such goods. Therefore, it includes import duty. Furthermore, it is contended that purchase value means the value of schedule goods as ascertained from original invoice or bill. In case of imported goods the bill of indent includes import duty and, therefore, it is included in the definition within the purchase value. The State Government very emphatically submits that charging Section governs the levy and is not controlled by the measure of tax. Charging Section, i.e. Section 3 of the Act contemplates that the tax is levied on the goods brought into local area for consumption, use or sale therein. Taxable person is the dealer or the person, who brings or causes to be brought into the local area scheduled goods on its own account or on account of its principal or customer or takes delivery or is entitled to take delivery of such goods. No invidious distinction is made between the goods brought from other local areas or outside the State or those brought from outside the country. The State Government further pleads that Entry 52 of List II of Seventh Schedule read with definitions of "entry of goods". Section 2(d) and "local area" Section 2(f) contemplates the taxable event is entry of goods into local area for consumption, use or sale therein. "Importer" as defined in Section 2(e) of the Act may be taken note of. The Customs Act takes care of levy of import of goods. So, 12

taxable event for levy of custom duty and entry tax are different and distinct. It is further submitted that looking to the "pith and substance" and "aspect" of levy, both the imposts are different and distinct and there is no overlapping. It is further brought to the notice of the Court that the order passed by this Court in Reliance Industries Limited Vs. State of Orissa, (2008) 16 VST 85 (Ori) has been stayed by the Supreme

Court by order dated 30.10.2009 in I.A. No. 327-651 in SLP "C" No.14454-14778 of 2008. It is further submitted that the decision rendered by the Sales Tax Tribunal in Hindustan Aeronautics Ltd case is under challenge before this Court in STREV Nos.34 and 35 of 2011. Hence, such findings recorded by the Tribunal has not become final and is not applicable to the case. As far as the plant is concerned, learned Advocate General submits that whether such plant is scheduled good or not is the subject matter for adjudication by the statutory authorities.

9. Thus, to reiterate the questions framed in all these cases for adjudication by this Court are as follows:-.

I. Whether the imposition of tax on goods purchased from outside the country is ultra vires the Constitution?
II. Whether the interpretation of the provisions of Orissa Entry Tax Act, 1999 itself shows that the entry tax is not leviable on goods imported outside the country ?,

III. Whether the plant, which has been brought into the local area of Balgopalpur in knock down condition is leviable with entry tax or not ? and

IV. Whether different raw materials, as described earlier in the case of M/s IFGL Refractories vs. State of Orissa and others in W.P.(c) No.7 of 2008 are liable for entry tax as they are not included in the schedule appended to the Act and to what relief the petitioners are entitled to.?

10. The first question relates to ban imposed under Article 286 of the Constitution of India on the legislative power of the State legislation to impose tax 13

on sale or purchase of goods where such sale or purchase takes place in course of import of goods into the country. Article 286 of the Constitution reads as follows:-

" 286. Restrictions as to imposition of tax on the sale or purchase of goods.- (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorizes the imposition of,-

(a) a tax on the sale or purchase of goods

declared by Parliament by law to be of special importance in inter-State trade or commerce;

(b) a tax on the sale or purchase of goods, being a

tax on the nature referred to in sub-clause (b),

sub-clause (c) or sub-clause(d) of clause (29-A)

of Article 366,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

Restriction under Article 286 of the Constitution is on authorizing imposition of tax on sale or purchase of goods by which the State legislature has a power, which is derived from Entry 54 of List II of the Seventh Schedule of the Constitution. However, power to legislate and levy on entry tax is derived from Entry 52 of the said List. The two fields of legislation are distinct and separate. So, the restrictions contained in Article 286 of the Constitution cannot be applied to the legislative field contained in Entry 54 of List II of the Seventh Schedule of the Constitution. This aspect arose before the Kerala High Court in *Fr. William 14*

Fernandez Vs. State of Kerala, (1999) 115 STC 591 (Ker) and has been answered against the petitioner though on a different aspect, the Kerala High Court has come to the conclusion that entry tax on goods imported from outside the country is not within the ambit of the Kerala's Act. It is apt to quote the exact word used by the Kerala High Court with regard to the constitutionality of entry tax in respect of Article 286 of the Constitution.

"12. It was urged that the limitations in Article 286 have not been surmounted and as such the Act is applicable to the appellants, who had imported vehicles from abroad. These submissions seem to us to be untenable. We do not agree that there are any limitations upon the State's power to legislate, which is covered by item 52 of List II of the Seventh Schedule of the Constitution as has been correctly held. Tax is due upon entry of goods into the local areas.xxx"

11. So far as the scope of imposition of entry tax on goods imported from outside the country is concerned, that aspect will be taken up by us later in this judgment. The aforesaid view was taken by the Gauhati High Court in the case of *Primus Imaging Pvt. Ltd. Vs. State of Assam, (2007) 9 VST 528 (Gau)*. At paragraph-12 of the said case, the Gauhati High Court has held as follows:- " 12. From a reading of Article 286 of the Constitution, it becomes clear that this article does not permit States to levy tax on the sale or purchase of goods, which takes place in the course of import into, or export out of the territory of India. The restriction, imposed on the State, is, thus, in respect of levy of tax on the sale or purchase of goods, which takes place in the course of import into, or export out of, the territory of India. The power to levy sales tax is derived from entry 54 of List II of the Seventh Schedule to the Constitution of India; whereas the power to levy entry tax is derived by entry 52 of the List II of the Seventh Schedule to the Constitution. Under entry 54, the point of levy is purchase or sale, but under entry 52, the point of levy is the point of entry into a local area. Therefore, taxable event under the Entry Tax Act is entry of specific goods into a local area for consumption, use or sale therein. Viewed thus, it is clear that levy of tax on sale or purchase, on the other hand, and the levy of tax on entry of goods into a local area, on the other, 15

are covered by different entries in the Constitution and the incidence of taxation in both the cases is different. The restriction, imposed by article 286 (1)(b) of the Constitution, is in respect of the levy of tax on sale or purchase of goods and not as regards entry of the goods into a local area for consumption, use or sale therein and, hence, the contention of the petitioners that levy of entry tax on goods imported from outside the State is hit by article 286 (1) (b) of the Constitution of India has no force and is misconceived. xxx"

12. In course of hearing, the petitioners have submitted that Entry 83 of List I of the Seventh Schedule of the Constitution confers exclusive power on the Indian Parliament to legislate on duties and customs including export duty and the levy of entry tax on imported goods would be encroaching on the exclusive legislative domain of the Indian Parliament conferred by Article 246(1) of the Constitution of India. It is apt to take note the exact words used in the relevant Entries of the Seventh Schedule of the Constitution. Entry 83 of List I of the Seventh Schedule reads as follows:-

"83. Duties of customs including export duties."

However, Entry 52 of List II of VII Schedule of the

Constitution reads as follows:-

"52. Taxes on the entry of goods into a local area for consumption, use or sale therein".

Taking recourse to Article 246 of the Constitution, it is urged on behalf of the petitioners that the State legislature cannot infringe the legislative power of the Parliament and levy of entry tax imposed on imported goods is directly in conflict with the exclusive legislative power of the Union of India. Article 246 of the Constitution reads as follows:

" 246. Subject-matter of laws made by Parliament and by the Legislatures of States.-

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to

any of the matters enumerated in List-I in the Seventh Schedule (In this Constitution referred as to the "Union List").

(2) xxx xxx xxx xxx (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

13. The legislative power of the Union and the State cover altogether different fields of legislation and the incidence of both taxes are distinct and separate. The Parliament has enacted Customs Act, 1962 in super-session of the "Sea" Customs Act, 1878. Section 12 of the Customs Act, 1962, levies duties on goods imported into India as may be specified in the Customs Tariff Act, 1975. The incidence of customs duty is on importation of goods into the territory of India. The word "import" has been defined in Section 23 of the Customs Act, 1962. It is apposite to quote the same. " 'Import' will all its grammatical variations and cognate expressions, means bringing into India from a

place outside India."

From the scheme of the Act it is seen that the point of levy of custom duty is a condition precedent for importation of goods to the country, i.e., before its clearance and before the goods are allowed to cross the custom barriers. On the other hand, the levy of entry tax, as per Section 3 of the Act, is that entry of goods into a local area for the purpose of consumption, use or sale therein. In *Kiran Spinning Mills Vs. Collector of Customs*, 1999 (113) ELT 753 (SC), the Hon'ble Supreme Court has examined this aspect at Paragraph-6 and held as follows:-

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" 6. Attractive, as the argument is, we are afraid that we do not find any merit in the same. It has now been held by this Court in Hyderabad Industries Ltd. and Anr. v. Union of India and Others [1999 (108) E.L.T. 321 (SC) = JT 1999 (4) SC 95] that for the purpose of levy of additional duty Section 3 of the Tariff Act is a charging section. Section 3 sub-section (6) makes the provision of the Customs Act applicable. This would bring into play the provisions of Section 15 of the Customs Act which, inter alia, provides that the rate of duty which will be payable would be on the day when the goods are removed from the bonded warehouse. That apart, this Court has held in *Sea Customs Act-1964* (3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event

occurs when the customs barriers is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country. xxx"

14. In *J.V. Gokal & Co. Pvt. Ltd. Vs. Assistant Collector of Sales Tax (Inspection)*, (1960) 11 STC 186 (SC), the Supreme Court has held as follows:- " What does the phrase " in the course of the import of the goods into the territory of India" convey ? The crucial words of the phrase are "import" and "in the course of ". The term "import" signifies etymologically "to bring in". To import goods into the territory of India therefore means to bring into the territory of India goods from abroad. The words "course means "progress from point to point". The course of import, therefore, starts from one point and ends at another. It starts when the goods cross the customs barrier in a foreign country and ends when they cross the customs barrier in the importing Country."

Having taken note of the ruling of the Supreme Court in the aforesaid two cases, this Court comes to the conclusion that when the goods imported out of the country, the incident of import ends the moment it crosses the custom barriers. It is also brought to the notice of this Court that in *Gulabdas Jagannath Vs. The State of Rajasthan*, AIR 1995 Rajasthan 225, the imposition of octroi duty, which is levied under Entry 52 of List-II of the Seventh Schedule to the Constitution on goods imported from outside the country, is held to be valid. 18

15. The petitioners, in all these cases, placed reliance on the ratio decided in *Godfrey Phillips India Ltd. Vs. State of Uttar Pradesh*, (2005) 139 STC 537 (SC). The ratio decided in the above case is distinguishable and is not applicable to the present cases and the same is demonstrated as follows:- In *Godfrey Phillips India Ltd.(Supra)* the assesses were either manufacturer or dealer of tobacco products. They assailed the levy of luxury tax on tobacco and its products under Uttar Pradesh Tax on Luxuries Act, 1995; the Andhra Pradesh Tax on Luxuries Act, 1987; and the West Bengal Tax on Luxuries Act, 1994. While interpreting Entry 62 of List II of the Seventh Schedule to the Constitution, the Supreme Court held that the word "Luxury" takes colour from the words 'entertainment, amusement, betting and gambling' and therefore, the legislature has no jurisdiction to levy tax on "tobacco" (a goods) in the garb of luxury by describing Tobacco as a luxury goods. In the reported case, the Supreme Court, further, held that since tobacco is declared as a goods, it may be liable for additional duty on excise to be imposed in lieu of sales tax by different States. Further, levy on sale of tobacco in the name of luxury tax is not permissible although an attempt was made to show storage. Tax on the goods under the Luxury Act was held to be impermissible under Entry 62 of List II. The Hon'ble Apex Court after holding that tobacco as a good, further, held that it cannot be taxed as luxury by interpreting Entry 62, List II. In paragraph-99 of the Judgment the Supreme Court, further, held that the scope of Entry 62 is not answered on other issues in the appeal and were left open. In the reported case in question, it was held that tobacco as an article could not be said to be luxury. The Supreme Court, further, held that the word "luxury" in Entry 62 of List II means the activity of enjoyment or indulgence in that which is costly and generally recognized as being 19

beyond necessary requirement of average number of the society and not article of luxury. Thus, on the basis of such view taken by the Supreme Court in the aforesaid case, it cannot be held that entry tax cannot be levied under the Act pursuant to Entry 52 of List II since the custom duty is levied on the imported goods under Entry 83 of List I.

Entry 62 of List II of the Seventh Schedule reads as follows:- " 62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

The taxable event of the Act is entry of goods into local area whereas custom duty on import of goods into territory of India. When the former is a subject matter of legislation by the State in Entry 52 of List II of the Seventh Schedule, the latter relates to Entry 83 of List I of the Seventh Schedule. There is no overlapping in the exercise of legislative power. Since imposition of custom duty ends once the goods cross the custom barriers, the custom duty is levied prior to crossing of barriers. But, in the context of levy of entry tax under the Act, it is levied on the entry of the scheduled goods into the local area. Taxable events in respect of the

levies, viz., "custom duty" and "entry tax" are different and distinct and there is no overlapping. Thus, there is no conflict between legislative power under Entry 83 of List I and Entry 52 of List II. The ratio decided in Godfrey Phillips India Ltd. (supra) does not render any aid to the petitioners' contention. Therefore, it is held that entry tax can be imposed on the goods, which are imported from outside the territory of India. The ratio decided in the aforesaid case is not applicable to the present case.

16. Relying upon in Central India Spinning and Weaving and Manufacturing Company Ltd. Vs. Municipal Committee, Wardha, AIR 1958 SC 20

341, the petitioners contended that the activity of importation does not end up on the crossing of the custom barriers but continues till the imported goods reach the godown of the importer in course of which goods have also to enter one or several local areas. Thereupon, it is urged that the entry tax leviable on entry of goods into the local area is essentially a tax on import of goods which is authorized only under Entry 83 of List I of the Seventh Schedule to the Constitution. The ratio decided in the aforesaid can be distinguished and is not applicable to the present case. In that case, the Hon'ble Supreme Court was dealing with levy of "terminal tax" at the point of exit from a local area. There the question was whether goods passing through Wardha Municipality by road dispatched from Yeotmal to their destination at Nagpur without being unloaded or reloaded at Wardha are liable to export terminal tax on the point of exit from the local Wardha Municipality. In the reported case, the goods in question were not imported from outside the country but the word "import" has been used to mean movement of goods from outside Wardha Municipality. In that context, the Supreme Court has held that movement of goods from Yeotmal to Nagpur through Wardha Municipality cannot attract levy of "terminal tax" at exit point of local area. Thus, the said case cannot be applied to the present fact situation to accord with the contentions raised by the petitioners. As has been noted in Kiran Spinning Mills & J. V. Gokal & Co. Pvt. Ltd (Supra) the import ends the moment goods brought from outside the country crosses the custom barrier. Therefore, the levy of entry tax on imported goods is permissible.

17. Furthermore, the provisions of Orissa Entry Tax Act does not reflect that the legislature has no intention of imposing tax on goods, which cross the custom barriers and are imported to the local area of the State. Entry 52 of List II of Seventh Schedule to the Constitution provides for taxes on entry of goods into a 21

local area for consumption, use or sale therein. Thus, the incidence of levy of tax as per Entry 52 is entry of goods into a local area. There is nothing in that entry to suggest that legislature intended to exclude levy of tax on the imports from other country.

18. This problem can also be seen from another angle. The Act is a tax in lieu of octroi incident of which are similar to that of entry tax. When the levy of octroi on imported goods was upheld by different courts, there is no reason why entry tax on the imported goods cannot be upheld. Now, it is seen that prior to introduction of the Act, the levy of octroi was invoked by virtue of powers conferred on the municipality and other local bodies under Section 131 (1) (kk) of the Odisha Municipal Act, 1950. However, on passing of the Act, the octroi has been abolished. Clause (3) of the Statement and objects and reasons as appended to the Tax provides that the bill further seeks for abolition of octroi duty levied and collected under the Odisha Municipal Act, 1950 by repealing clause (kk) of sub- section (1) of Section 131. By virtue of Section 41, such clause (kk), as described above to the Municipality Act, was repealed. Section 36 of the Act further provides for assignment of proceeds of tax among the local authorities. Rule 33-A of the OET Rules and procedure prescribes the method of distribution of entry tax collected to each local authority every year. The entry tax is, thus, in essence a tax in lieu of octroi duty. Therefore, the decisions rendered in the context of levy of octroi are applicable to this case.

19. Thus, on the basis of the aforesaid discussion, this Court comes to the conclusion that the contention of the petitioners that levy of a tax on import of goods is within the exclusive legislative domain of the Parliament, and this power conferred on the Parliament by the Constitution cannot be encroached upon, 22

directly or indirectly, by any State Legislature. In the cases at hand, as the entry tax has been levied on such goods which cross custom barriers by invoking the powers conferred on the State Legislature covered under Entry 52 of List II of the Seventh Schedule, there is no encroachment of the powers of the Parliament.

20. The next question that arises for determination is whether the interpretation of provision of the Orissa Entry Tax Act itself shows that entry tax is not leviable on the goods imported from outside the country. For this aspect of the case, it is appropriate to take note of Section-3, which provides for levy of tax. It reads as follows:-

"3. Levy of Tax.-

(1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve percentum of the purchase value of such goods from such date as may be specified by the Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be

prescribed.

Provided that the State Government may direct that in such circumstances and under such conditions and for such period as may be prescribed, a dealer shall pay in lieu of tax payable under this Act a sum fixed in the prescribed manner, and in such a case the tax shall be deemed to have been compounded.

(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who bring or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:

Provided that no tax shall be levied under this Act on the entry of scheduled goods into a local area if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.

Explanation.-

23

Whether the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area.

(3) Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any motor vehicle into any local area for use or sale therein which is liable for registration in the State of Orissa under the Motor Vehicles Act, 1988 (59 of 1988), and rate of tax shall be at such rate or rates as may be specified by the State Government by notification on the purchase value of such motor vehicles. Explanation.-

For the removal of doubts, it is hereby declared that where any scheduled goods have been subjected to the levy of octroi under the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950), prior to the commencement of this Act for entry into any local area, those goods shall not be subjected to the levy of entry tax under this Act for their entry into that area on or after such commencement."

21. From the plain reading of the above provision, it is clear that the legislature has no intention that imported goods are intended to be left out from the charging Section. The entry tax is leviable on scheduled goods

brought into a local area for consumption, use and sale therein.

22. In Polestar Electronics (Pvt) Ltd. Vs. Additional Commissioner of Sales Tax, (1978) 41 STC 409 (SC), it is held that : " xxx it is only from the language of the Statute that the intention of the legislature must be gathered, for the legislature means no more and no less than what it say. It is not permissible to the Court to speculate as to what the Legislature must have intended and then to twist or bend the language of the statute of the statute to make it accord with the presumed intention of the legislature.

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23. Similar view has been expressed by the Supreme Court in the case of Muralidhar Mahabir Prasad vs. B.R. Vad (1976) 37 STC 77 (SC), wherein it has been held that:

" xxx equitable construction may be admissible in relation to other statutes, but such an interpretation is not permissible to a charging or taxing provision of a statute."

24. Thus, it is clear from the aforesaid cases that the plain language of the charging provision has to be taken into consideration. In the schedule of goods also there is no exclusion from levy of tax on imported goods. Section 6 of the Act has provided the State Government to notify to exempt any scheduled goods either in part or full in public interest from levy of entry tax or to exempt any class or classes of persons engaged in charity or social services from such levy. The State Government has not issued any notification exempting any scheduled goods from levy of entry tax on their being brought from foreign countries.

25. The learned counsel for the petitioners has relied heavily on the definition of "purchase value" of the goods on which tax is to be calculated and it is submitted that since the purchase value does not include customs duty, the legislature intended that the goods imported from outside the country are not to be subjected to the entry tax.

26. The Supreme Court in Govind Saran Ganga Saran Vs. Commissioner of Sales Tax, (1985) 60 STC 1 (SC) has laid down that the levy of tax to be operative four elements are to be provided. (i) Character of imposition known by its nature, which prescribes the taxable event attracting levy,

(ii) Clear indication of the person on whom levy is imposed and who is obliged to pay the tax,

(iii) The rate of tax at which the tax is imposed, 25

(iv) The measure or value to which the rate will be applied for computing the tax liability.

27. Charging Section 3 is the prime purpose of taxing legislation and the other three components are subservient of main purpose of levy. The charging section shall control the other three components including the measure of levy and not vice versa. The measure of levy cannot be used to interpret the nature and scope of charging section. This view has been expressed in the case of Tamil Nadu Kalyana Mandapam Association Vs. Union of India, (2004) 135 STC 480 (SC). At paragraph-44 the Supreme Court has held that it is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

28. Viewed in a slightly different context, it is seen that purchase value has been defined under Section 2(j) of the Act and it reads as follows:- "(j) "Purchase Value" means the value of scheduled goods as ascertain from original invoice or bill and includes insurance charges, excise duties, countervailing charges, sales tax, [value added tax or, as the case may be, turnover tax] transport charges, freight charges and all other charges incidental to the purchase of such goods;

Provided that where purchase value of any scheduled goods is not ascertainable on account of non-availability or non- production of the original invoice or bill or when the invoice or bill produced is proved to be false or if the scheduled goods are acquired or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market;"

A plain reading of the above provision reveals that "purchase value" of the goods has to be derived from invoice of goods and any subsequent levies thereafter to form part of purchase value for the purpose of levy of entry tax. The invoice of the imported goods purports to indicate the custom duty on such goods 26

and the said duty has to form part of the sale price and deemed to have been passed on to the purchaser. Section 28C of the Customs Act lays down that the price of goods to indicate the amount of duty paid thereon. It reads as follows:- "28C.Price of goods to indicate the amount of duty paid thereon.- Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

29. Thus, the customs duty is bound to be indicated in the original invoice or bills. The value of goods is ascertainable from the invoice itself, which is inclusive of the customs duty. The purchase value, which includes other kinds of levy such as insurance, excise duty, countervailing duty, sales tax, value added tax, turnover tax. Even on top of it the clause "all other charges incidental to the purchase of such goods" would take within its sweep any other duties including the customs duty as well.

30. In *Garware Nylons Ltd. Vs. Pimpri Chinchwad Mahanagar*, 1995 (77) ELT 22 (SC), the Supreme Court considered the question whether custom duty is included while determining the value for charging of octroi, and held that octroi is leviable on imported goods and the custom duty shall form part of the value of the goods. In doing so, the Supreme Court has relied upon the reported case of *Shroff and Co. Vs. Municipal Corporation of Greater Bombay*, (1989) Supp. 1 SCC 347. In that case, the Supreme Court has held that octroi duty is leviable on imported goods and the countervailing duty will form part of value for purpose of levy. Thus, the argument of the petitioners that since customs duty is not specifically mentioned in the definition of purchase value in Section 2(j) of the 27

Act, it will give rise to the inference that legislature intended not to levy entry tax on imported goods is without substance.

31. The learned counsel for the petitioners submits that the definition of entry tax as defined in sub-Section 2(d) of the Act does not include "from outside the country" and, therefore, the tax on imported goods is clearly beyond the ambit of entry tax. However, if we adopt the literal construction of statute, as has been discussed in the earlier paragraphs, without adding anything, "outside the State " means any place outside the State and includes all places outside the State as well as outside the country. Had the legislature intended to exclude imported goods from the net of taxation, the words "except goods brought from outside the country" would have been mentioned in the above definition. The two phrases "any place outside that local area" and "any place outside the State" were used to signify that entry tax will be levied on (a) when goods move into the local area from another local area within the State and (b) when the goods are brought into the State.

32. By applying the principle of interpretation of the taxing law that charging section is not to be controlled by subservient components, the definition "entry of goods" cannot be taken help to urge that the entry tax on imported goods cannot be levied.

33. As has been pointed out earlier, in a taxing Act, the Court has to look merely at what is clearly said. There is no room for adding or subtracting anything from the statute. There is also no equity about a tax and there is

no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. In this connection, the reported cases of Commissioner of Income Tax vs. Ajax Products Ltd., AIR 1965 SC 1358; Commissioner of 28

Income Tax vs. Kharwar, AIR 1969 SC 812; Calcutta Jute Manufacturing Co. Vs. Commercial Tax Officer, (1997) 106 STC 433 (SC) are relied upon.

34. In Commissioner of Sales Tax vs. Parson Tools and Plants, (1975) 35 STC 413 (SC), the Supreme Court has held that where the legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law-giver; more so if the statute is a taxing statute.

35. The Supreme Court in Federation of Hotels and Restaurants Association Vs. Union of India, (1989) 74 STC 102(SC) has applied the principle of pith and substance to interpretation of the statute and laid down that the true nature and character of the legislation must be determined with respect to the question of power of legislature. The consequence and effect of the legislation are not same thing as the legislative subject matter. The true nature and character of the legislation but not the ultimate result that matters.

36. Thus, on the basis of the discussions resorted to above, this Court comes to the conclusion that the argument advanced by learned counsel for the petitioners that entry tax is not leviable on the goods imported through buyers is attractive but is without substance.

37. The next question that requires adjudication is, whether the plant, which has been brought into local area of Balgopalpur in knock down condition, is leviable with entry tax or not. This question is to be decided in the writ petition filed by M/s Emami Paper Mills Vs. State of Orissa (W.P.(c) No.13978 of 2008). The learned counsel for the petitioner, in this case, has submitted that since the 29

aforesaid plant and machinery were brought in knock down condition, as it was impossible to move the plant to USA to the site on which the plant is to be established, the said plant and machinery brought in knock down condition were transported in parts. As such it is contended that since the plant is not a scheduled item in the entry tax Act, the petitioner is not liable to pay entry tax on the same.

38. Part-II of Schedule-1 Entry 9 reads as follows:- " Machinery and equipments including earthmovers, excavators, bulldozers and road-rollers and spare parts and components used in manufacture, mining,

generation of electricity, or for execution of work of contract or for any other purpose"

39. Thus, it is to be seen whether the plant and machinery, which are brought from USA to establish a factory at Balgopalpur for production of papers, are liable to entry tax or not. As Plant has not been defined separately in the Act, we have to go by the grammatical definition of 'Plant'. 'Plant', as per the Concise Oxford Dictionary, means 'a place where an industrial manufacturing process takes place' and 'machinery used in an industrial or manufacturing process'. So, plant is a combination of various machinery, which are used in a manufacturing of product. As has been mentioned earlier, in a taxable statute, nothing has to be added or subtracted from the plain meaning of words appearing in the statute. We are of the opinion that the plant, which is brought in knock down condition, is a combination of machinery in a systematic manner so as to produce goods and, therefore, it is coming within the definition of machinery and, hence, it is liable for entry tax.

40. The next question relates to certain raw materials and spares, as described in paragraph-6 of our judgment, which have been imported and purchased from other States out of the country by M/s IFGL Refractories (W.P.(c) No.7 of 2008). Having carefully examined the items described in the 3rd sub- 30

paragraph of paragraph 6, we come to the conclusion that the items like Ladle Shrouds, Sub entry Nozzels, Monoblock Stopper, Tundish Nozzle, Slide Gate Plates and raw materials like Fused Silica, Lime stabilize Fused Zirconia, Fused Magnesia, Sintered Magnesia, Silicon Metal, Natural PVC, Refractory Glaze, Furfural Alcohol and Micro Silica, etc are not included in the schedule. Similarly, the raw materials described in the 4th sub-paragraph of paragraph-6, at page-9, like Mag Alumina Spinel, Zircon sand/Flour, Bauxite (Rotary Kiln/Calcined), Tabular Alumina, Brown Fused Alumina, White Fused Alumina, Reactive Alumina, Dead Burn Magnesia, Silicon Carbide, Borax, Allu Metal, Carbon Black are not included in the Ist schedule. Therefore, they are not liable for entry tax. Accordingly, this question is decided in favour of the petitioner.

Thus, on the basis of aforesaid discussion, this Court comes to the conclusion that the imposition of tax on goods purchased from outside the country does not violate the ban imposed under Article 246 of the Constitution to enact law from Entry 52 of List II of Seventh Schedule. It is further held that the provisions of Orissa Entry Tax Act itself do not reveal the intention of the legislator not to tax goods, which has been purchased from outside the country. The paper plant, which is brought in a knock down condition by Emami Paper Mills, comes within the definition of machinery and is liable for entry tax. Lastly, the various raw materials and spares, as described in the case of IFGL Refractories Ltd. Vs. State of Orissa, are not liable for entry tax. Accordingly, the issues are decided and all the writ petitions, except W.P.(C) No.7 of 2008, are dismissed in the light of above observations. W.P.(C) No.7 of 2008 is allowed to the extent indicated above. All the Misc. Cases, arising out of the writ petitions, are disposed of. 31

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S.K. Mishra,J.

V. Gopala Gowda, C.J. I agree.

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V. Gopala Gowda, C.J.

Orissa High Court, Cuttack

Dated, 9th October, 2012/PCD